UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 673

Case No. 730: HOSSAIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 2 May 1993, S.M. Taifur Hossain, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application containing pleas which, in part, request the Tribunal to:

"...

(b) Rescind the separation order from the Executive Director UNICEF (DOP/PPSS/NR/92-165 dated 29 December 1992) ...

(c) [Order the] retroactive reinstatement as an International Professional Officer with all benefits without any prejudice ... [and] removal of all papers related to this case from my personal file.

(d) [Award] ... the legal costs ... for taking my counsel from India to Dhaka. ... approximately US$10,000. Additionally ... US$100,000 as compensation for psychological trauma to myself and family and loss of face ...

..."

Whereas the Respondent filed his answer on 8 June 1994;

Whereas the Respondent filed his answer on 8 June 1994;

Whereas, on 12 October 1994, the Applicant filed written observations;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF in Dhaka, Bangladesh on 1 April 1973, on a three month fixed-term appointment as a Field Assistant at the GS-5 level. His appointment was successively extended, and on 7 September 1974, the Applicant was transferred to the Jessore Field Office. On 1 January 1975, his title was changed to District Representative, and on 1 April 1975, he was promoted to the G-6 level. On 2 November 1977, the Applicant was transferred back to Dhaka and his title was changed to Programme Assistant. On 1 April 1978, he was promoted to the National Officer (NO) level A, and his title was changed to Assistant Programme Officer, Education Section. On 1 January 1981, his appointment was converted to probationary and became permanent with effect from 1 July 1981. On 1 January 1984, the Applicant was promoted to the NO-B level, and on 1 January 1986, to the NO-C level as Programme Officer.

On 17 March 1992, the Chief, Education Section, of the UNICEF Office in Dhaka informed the Chief, Operations Section, that some television (TV) sets procured by UNICEF for distribution to government counterparts had left UNICEF premises but had not reached their destination. She requested that the matter be investigated. On 2 April 1992, an Investigation Committee was appointed "to carry out further investigation into the possible lapse in the distribution of UNICEF's supplied Audio-Visual equipment". The Investigation Committee examined all relevant documentation, reviewed procurement procedures and the issuance of gate passes, and undertook further in-house investigations. The Committee also visited Government and Non-Governmental Organization representatives.

On 22 April 1992, the Investigation Committee submitted its report to the UNICEF Representative in Bangladesh. It found that of 51 TV sets, 8 were not accounted for in accordance with gate passes for them. Two were assumed to be those found in the Education Section, leaving 6 sets unaccounted for. Of 68 video-cassette recorders, 6 were missing. All gate passes relating to missing equipment were authorized by the Applicant, almost all during the absence of the Chief of the Section. These gate passes were - nearly all - requested by the Assistant Programme Officer, although, on occasion, the Applicant both requested and authorized the gate passes. The report concluded, "it is obvious that [the Applicant] ... and [the] Assistant Programme Officer ... are major staff involved in fraudulent activities which led to the unaccounted six (6) TVs, six (6) VCRs and other related supply and equipment."

On 18 May 1992, the Senior Operations Officer of UNICEF Dhaka and the Chief, Supply Section, UNICEF New Delhi, held an unannounced meeting with the Applicant in Hyderabad (India) to confront him with the findings of the investigation and to invite him to resign from UNICEF and make restitution for the losses involved, or alternatively to request him to prepare a response. The Chief, Field Office, Hyderabad, attended part of the meeting. The Applicant was requested to make a decision on these options within two hours. His request to call the UNICEF Dhaka Office was denied. After a short break in the meeting to consider his options, the Applicant submitted a handwritten resignation which read, "... I offer myself to resign on moral grounds and my responsibility as approving officer." At the meeting, the Applicant was given a letter dated 19 May 1992 from the Representative in Bangladesh which stated, inter alia:

> "We have offered you the option to resign on condition that you restitute fully to UNICEF the value of these items. You chose to decline this offer. You have 14 days from this date, i.e., up to close of business on 2 June 1992, to respond to the charges of misconduct as outlined in this letter, following which we will submit the case to the Executive Director for a decision ...

Effective today, you are suspended from duty with full pay ..."

On 19 May 1992, the Applicant wrote to the UNICEF Representative, India Office, to withdraw his resignation. His letter reads as follows:

"You are aware that ... and ... paid a visit to our Hyderabad Office on 18 May 1992 to acquaint with the outcome of an internal investigation in the Education Section in Dhaka. It was depressing to me that a person with integrity working more than 17 years was harassed on grounds of misappropriation of six TVs/VCRs. The investigation was carried out in my absence and upon my departure from Dhaka, may be with some vested interest. I was not given adequate opportunity for any sort of clarification or was allowed to call Dhaka Office.

A letter of suspension was shown to me signed by ... who is not my supervisor at present and I was offered two options to accept without any staff representative or a counsellor. The options were:

(1) Resign by 1500 hrs of 18 May 1992 and I can restore all my entitlements, or

(2) I can call for an investigation by 2 June 1992 and I miss all my benefits.

I called Dhaka and found out most of the items have been traced in the Section. There may be some anomalies in the system for which some corrective steps should have been advised to me by my previous supervisor.

I like to mention that I was forced to resign under psychological pressure from ... which was created during two hours one-sided deliberations.

Keeping the above in mind, I like to withdraw my forced upon resignation and request you to look into the situation once again."

On 21 May 1992, the Applicant wrote another letter to the UNICEF Representative, India, discussing the allegations against him and concluding:

> "... [I] gave in writing my offer to resign under great stress and agony for fear of being deprived benefits as [I] am a person from a third world country. Later realizing that [I] have the right to defend my case, [I] have promptly withdrawn my offer to resign in my fax to you of 19 May.
>
> ..."

On 22 May 1992, the Applicant wrote to the Director, Division of Personnel, requesting that appropriate action be taken "to restore [his] staffship." In a reply dated 1 June 1992, the Director, Division of Personnel, informed the Applicant: "we exceptionally agree to disregard your resignation, in view of the seriousness of your allegation and for the purpose of ensuring that justice is fully served". He requested the Applicant to submit his response within two weeks of receipt of the relevant documents on the case.

On 25 June 1992, after a visit with his counsel to Dhaka for meetings with UNICEF staff members and Government officials, the Applicant submitted his response to the charges of misconduct, which reads, in part, as follows:

> "... The Committee apparently overlooked the fact that after my departure from Dhaka, Education Section was reorganized. During the reorganization [a] lot of equipment was moved and possibility of misplacing can not be simply discounted. This is evident from the fact that 2 VCRs, 1 TV and 1 Stabilizer were located in the section around 18/19 May 1992. Information like discovery of more equipment in the section subsequently was not shared with me.
>
> ...
>
> On going through documents you will notice that I have responded fully to each and every allegation made against me. I HAVE PROVED THAT THERE WAS NO MISCONDUCT OR MISAPPROPRIATION OF ANY EQUIPMENT ON MY PART."

On 30 June 1992, the Investigation Committee submitted comments to the UNICEF Representative, Dhaka, on the Applicant's response to the allegations and reconfirmed its original conclusion that the Applicant and the Assistant Programme Officer had "misused

UNICEF property." On 13 July 1992, the UNICEF Representative, Dhaka, transmitted the report of the Investigation Committee, together with related documentation, to the Director, Division of Personnel, stating inter alia:

> "Two TVs are missing and the whereabouts of these are not addressed in [the Applicant's] response;
>
> Two gate passes signed by [the Applicant] were issued in the name of persons not employed by the Ministry of Education (...);
>
> One TV and two VCRs reappeared in the UNICEF Education Section and three TVs and one VCR in the Ministry of Education stores after ... and ... were presented with the allegations; and
>
> There are several inconsistencies in the reply of [the Applicant].
>
> I recommend that UNICEF take this matter most seriously and separate the staff member on the grounds of a breach of our basic standards of management and conduct."

A Joint Disciplinary Committee (JDC) was established on 23 August 1992. On 22 October 1992, it submitted its report to UNICEF Headquarters containing the following summary of its conclusions:

> "In summary the JDC states that there was loss of value to UNICEF, and that some compromise of UNICEF/GOB [Government of Bangladesh] relations ensued and this was a result of pre-conceived acts. There is however, no evidence to suggest it was consciously intended to defraud the organization but was rather a knowing and wilful approval for misappropriation and misuse of UNICEF equipment, most probably by Senior Government officials."

The JDC made the following recommendation in paragraph 6 of its report:

> "JDC recommends that given the nature of the wrong doing, that the S/M [staff member] be demoted, and two members (...) of the JDC believe he should not be considered for promotion nor for management responsibility for a considerable period in the future, (say 7-10 years)."

By letter dated 29 December 1992, the Applicant was notified of his dismissal for misconduct, with effect from two weeks after the date of its receipt. The letter read, in part, as follows:

> "... The main points of the JDC's findings are highlighted below:
>
> - that you breached UNICEF rules by issuing gate passes, in two separate instances, in fictitious names, and that you knowingly approved the misappropriation of equipment, although not for your own personal material gain;
>
> - that you knowingly broke basic rules of conduct and procedure of UNICEF, specifically by authorizing irregular activities on at least two occasions.
>
> - that you contributed to jeopardizing relations between the Government of Bangladesh and UNICEF;
>
> - that you are held responsible and accountable for one missing TV set.
>
> ...
>
> The JDC recommended to take disciplinary measures against you, in the form of a demotion. Additionally, two members recommended that you not be considered for promotion nor for management responsibility for a considerable period in the future.
>
> Having considered all the facts and findings, ... the Executive Director has concluded that your actions indicate a clear pattern of abuse of UNICEF's rules and regulations. The Organization views very seriously such actions, particularly as you were, by virtue of your official position, a Senior National Officer responsible for the equipment in the UNICEF Education Section in Dhaka, Bangladesh.
>
> Therefore, while noting the recommendation of the JDC, the Executive Director has decided that given the gravity of such actions, you be separated from service as a disciplinary measure under staff rule 110.3(a). While normally staff on project personnel appointment would only receive thirty days salary in lieu of notice, the Executive Director has exceptionally decided to pay you for three months salary in lieu of notice, as provided in staff rule 109.3, taking into

account that prior to your project personnel appointment you were the holder of a permanent appointment in the National Officer category. ..."

On 6 January 1993, the Applicant requested the Executive Director of UNICEF to reconsider the decision to separate him from the Organization. In a reply dated 14 January 1993, the Division of Personnel informed the Applicant that "the final decision of the Executive Director remains as stated".

On 2 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Investigation Committee which framed the initial charges against the Applicant lacked depth and thoroughness, knowingly hid facts, knowingly accepted false evidence, and forged evidence to support charges against the Applicant. Hasty conclusions were drawn from the report of the Investigation Committee, which were forwarded to Headquarters and later disproved, raising questions about the motives of the Representative, whose intention was to malign and punish the Applicant for professional differences.

2. The conduct of the Investigation Committee violated the basic principles and procedures of staff rule 110.4. The Applicant was not informed of the investigation proceedings. He had a right to be informed of the accusations against him and a right to defend himself before the Representative concluded that he was guilty. This was evidenced by the request that he resign immediately, when he was confronted with the charges against him.

3. The request for the Applicant's resignation violates staff rule 209.1(a) which states: "A resignation within the meaning of these rules is a separation initiated by the individual."

Whereas the Respondent's principal contentions are:

1. The United Nations Charter and the United Nations Staff Regulations and Rules require that staff meet the highest standards of integrity. The Secretary-General and, by delegation, the Executive Director of UNICEF have the responsibility to ensure that these standards are maintained.

2. The Applicant's dismissal was preceded by a fair hearing which fully respected his due process rights.

The Tribunal, having deliberated from 12 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant requests, inter alia, that the Tribunal rescind the decision by the Executive Director to dismiss the Applicant for misconduct and order the retroactive reinstatement of the Applicant. He also seeks compensation for psychological trauma and humiliation amongst his colleagues, and requests official reprimand of certain named officials for their conduct in the investigation of his case. The issue before the Tribunal is whether the termination of the Applicant's employment on grounds of misconduct was a valid exercise of the Executive Director's authority.

II. Article 101, paragraph 3 of the United Nations Charter and staff regulations 4.1 and 4.2 call for the recruitment of staff members "of the highest standards of efficiency, competence and integrity." Correlatively, the authority exists to terminate appointments when these standards are no longer met. The Executive Director, by delegation from the Secretary-General of the United Nations, has the authority to dismiss staff members for misconduct pursuant to staff regulation 10.2. In a case of misconduct, the choice of the appropriate disciplinary measure falls within the Secretary-General's discretionary power. In this regard, the Tribunal held in Judgement No. 479, Caine (1990), that:

> "... the Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them. The Tribunal's review of such cases is limited to determining whether the Secretary-General's action was vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact." (See also Judgements No. 424, Ying (1988) and No. 425, Bruzual (1988))

III. The Applicant claims that UNICEF officials in the Dhaka Office continually "shifted the charges" against him. The central charge made by the Investigation Committee, in its report of 22 April 1992, was the Applicant's alleged involvement "in fraudulent activities which led to the unaccounted six (6) TVs, six (6) VCRs and other related supply and equipment." Along with this main charge, the Applicant was accused of issuing two gate passes to persons not employed by UNICEF.

Based on these charges, the UNICEF officials in the Dhaka Office asked the Applicant for his resignation. Subsequently, having resigned and then withdrawn his resignation, the Applicant responded to the charges against him in a communication to the Investigation Committee. The Investigation Committee consequently submitted a second report, dated 30 June 1992, which involved only two missing TVs and one screen. This second report was transmitted to UNICEF Headquarters in New York on 13 July 1992. A Joint Disciplinary Committee (JDC) was convened to consider the charges of misconduct against the Applicant. In its report submitted on 22 October 1992, the JDC concluded that the Applicant was responsible for only one unaccounted TV and the unauthorized issuing of gate passes.

IV. The Tribunal finds the continuous modification of the findings against the Applicant disturbing, especially in the light of his contention that the investigation lacked thoroughness and was tainted by the manipulation of evidence. A charge of fraudulent activity is a serious and damaging allegation, which may cause humiliation and irreparable harm to the personal and professional

reputation of the accused and to his or her prospects for career advancement. In this instance, the charges led to the termination of the Applicant's employment after nearly twenty years of service with the United Nations. In the circumstances, the Administration is expected to exercise the utmost rigor in investigating charges of misconduct. In this case, the investigative process, which appears to have resulted in a frequent modification of the alleged facts underlying the charges against the Applicant, did not adequately respect the Applicant's right to due process.

V. It is a fundamental right of any staff member accused of misconduct to be informed of the charges against him or her and to be given an opportunity to respond to them. The manner in which the Applicant was initially informed of the charges against him, with a simultaneous demand for his "resignation", deprived the Applicant of an opportunity to respond to the charges before a determination of his culpability was made. There is some evidence that the Applicant may have been subjected to psychological pressure at the two hour meeting attended by two, and at times three, UNICEF officials to discuss the charges against him. The Applicant was suddenly faced with these charges, without any advance notice even of the meeting. Moreover, during that meeting, the Applicant requested and was denied permission to make a telephone call from Hyderabad (India) to Dhaka. Indeed, these unsatisfactory aspects of the case were indirectly referred to by the Director, Division of Personnel, in his letter to the Applicant, dated 1 June 1992, accepting the withdrawal of the Applicant's resignation and stating inter alia:

> "[We] exceptionally agree to disregard your resignation, in view of the seriousness of your allegation and for the purpose of ensuring that justice is fully served."

VI. The JDC subsequently reviewed the charges of misconduct against the Applicant. Its main findings, as summarized in the Applicant's letter of dismissal, were:

"- that [the Applicant] breached UNICEF rules by issuing gate passes, in two separate instances, in fictitious names, and that [the Applicant] knowingly approved the misappropriation of equipment, although not for [his] own personal material gain;

- that [the Applicant] knowingly broke basic rules of conduct and procedure of UNICEF, specifically by authorizing irregular activities on at least two occasions;

- that [the Applicant] contributed to jeopardizing relations between the Government of Bangladesh and UNICEF;

- that [the Applicant is] held responsible and accountable for one missing TV set."

The JDC recommended that disciplinary measures be taken against the Applicant, in the form of demotion, and that he not be considered for promotion or management responsibility for a considerable period in the future. However, the Executive Director concluded that the Applicant's actions indicated "a clear pattern of abuse of UNICEF's rules and regulations". He therefore decided to terminate his appointment as a disciplinary measure, with payment of three months net base salary in lieu of notice of termination.

VII. Notwithstanding the Executive Director's discretionary power in this respect, his conclusion that the Applicant's actions constituted "a clear pattern of abuse of UNICEF's rules and regulations", which formed the basis of his decision, is not fully supported by the evidence before the Tribunal. The Executive Director asserted, in his letter to the Applicant of 29 December 1992, that this conclusion was based upon the facts and findings of the JDC report. However, the JDC found the Applicant guilty of less than what he was charged with. For example, in paragraph 4.1 of its report, concerning "Allegation of Misconduct No. 2.1", the JDC concluded:

"The currently unaccounted items are 1 TV, and 2 VCRs, as much of the original missing equipment has been located and/or returned. There is no evidence that the S/M [staff

> member] was responsible for the missing two VCRs. The S/M is held responsible and accountable for the one missing TV."

Similarly, with respect to "Allegation of Misconduct No. 2.2" the JDC concluded in paragraph 4.2 of its report:

> "There is no evidence that the staff member personally despatched any goods or equipment. Only in the two cases where the staff member requested and approved gate pass [sic], is he considered by the JDC to be in breach of normal UNICEF rules and procedures."

These conclusions do not indicate that there was a pattern of abuse with which the Applicant was initially charged.

VIII. The fact that the Executive Director did not follow the recommendation of the JDC to demote the Applicant and decided instead to terminate the Applicant's appointment did not, in the Tribunal's view, violate the Applicant's rights, as recommendations of the JDC are advisory. (Cf. Judgement No. 582, Neuman (1992)). However, the decision to separate the Applicant must be considered in the light of the procedural irregularities which took place in the initial stages of the investigation. The Executive Director's decision to separate the Applicant for misconduct, despite the JDC's recommendation for more lenient disciplinary sanctions, was apparently based on a factual finding which is not fully supported by the findings of the JDC. In addition, the procedural irregularities in the conduct of the initial phase of the investigation deprived the Applicant of his right to be informed of the charges against him and to present a defence. In the light of these circumstances, the Tribunal finds that the decision to terminate the Applicant's appointment was tainted by procedural irregularities. For this, the Applicant is entitled to compensation.

IX. The Tribunal, however, agrees with the Executive Director's conclusion that the actions and omissions of the Applicant, on which

his decision to separate him were based, constituted a breach of trust and displayed a lack of honesty and trustworthiness which demonstrated that the Applicant did not meet the standard required of an international civil servant.

X. For the reasons set forth above, the Tribunal orders the Respondent to pay to the Applicant five months of his net base salary at the time of his separation from service.

All other pleas are rejected.

(Signatures)

Samar SEN
President

Francis SPAIN
Member

Mayer GABAY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary